

**TITLE 14. Fish and Game Commission
Notice of Proposed Changes in Regulations**

NOTICE IS HEREBY GIVEN that the Fish and Game Commission (Commission), pursuant to the authority vested by sections 2070 and 2075.5 of the Fish and Game Code and to implement, interpret or make specific sections 1755, 2055, 2062, 2067, 2070, 2072.7, 2075.5 and 2077 of said Code, proposes to amend Section 670.5, Title 14, California Code of Regulations, relating to animals of California declared to be endangered or threatened.

Informative Digest/Policy Statement Overview

At its August 30, 2002 meeting in Oakland, California, the Fish and Game Commission (Commission) made a finding that coho salmon north of San Francisco warrants listing pursuant to the California Endangered Species Act (CESA). Specifically, the Commission determined that the coho salmon populations between San Francisco and Punta Gorda should be listed as an Endangered Species and the populations between Punta Gorda and the northern border of California should be listed as a Threatened Species.

The Commission therefore proposes to amend Section 670.5 of Title 14, CCR, to add the coho salmon populations between San Francisco and Punta Gorda to the list of Endangered Species and the coho salmon populations between Punta Gorda and the northern border of California to the list of Threatened Species.

This proposal is based upon the documentation of population declines and threats to the habitat of this species to the point that it meets the criteria for listing by the Commission as set forth in CESA. The Commission is fulfilling its statutory obligation in making this proposal which, if adopted, would afford coho salmon north of San Francisco with the recognition and protection available under CESA.

NOTICE IS ALSO GIVEN that any person interested may present statements, orally or in writing, relevant to this action at a hearing to be held the Elk Valley Rancheria, 2500 Howland Hill Road, in Crescent City, California, on Friday, June 25, 2004, at 8:30 a.m., or as soon thereafter as the matter may be heard. It is requested, but not required, that written comments be submitted on or before June 18, 2004 at the address given below, or by fax at (916) 653-5040, or by e-mail to FGC@dfg.ca.gov, but must be received no later than June 25, 2004 at the hearing in Crescent City, CA. All written comments must include the true name and mailing address of the commentator.

The regulations as proposed in strikeout-underline format, as well as an initial statement of reasons, including environmental considerations and all information upon which the proposal is based (rulemaking file), are on file and available for public review from the agency representative, Robert R. Treanor, Executive Director, Fish and Game Commission, 1416 Ninth Street, Box 944209, Sacramento, California 94244-2090, phone (916) 653-4899. Please direct requests for the above mentioned documents and inquiries concerning the regulatory process to Robert R. Treanor or Sherrie Koell at the preceding address or phone number. **Gail Newton, Department of Fish and Game, phone (916) 327-8841, has been designated to respond to questions on the substance of the proposed regulations.** Copies of the Initial Statement of Reasons, including the regulatory language, may be obtained from the address above. Notice of the proposed action shall be posted on the Fish and Game Commission website at http://www.dfg.ca.gov/fg_comm/.

Availability of Modified Text

If the regulations adopted by the Commission differ from but are sufficiently related to the action proposed, they will be available to the public for at least 15 days prior to the date of adoption. Any person interested may obtain a copy of said regulations prior to the date of adoption by contacting the agency representative named herein.

If the regulatory proposal is adopted, the final statement of reasons may be obtained from the address above when it has been received from the agency program staff.

Impact of Regulatory Action

The Administrative Procedure Act (APA) requires state agencies to assess the potential for adverse economic impacts whenever they propose to adopt, amend, or repeal any administrative regulation (see generally Gov. Code, §§ 11346.3, 11346.5). The APA also requires state agencies to adhere to the economic assessment requirements to the extent such requirements do not conflict with other provisions of state or federal law (*Id.*, § 11346.3, subd. (a)).

CESA does not specifically prohibit consideration by the Commission of potential economic impacts that may result from a decision to list a species as threatened or endangered under state law. Yet, the information and criteria by which the Commission is required to determine whether a species should be listed under CESA as threatened or endangered are limited to biological considerations (see, e.g., Fish & G. Code, §§ 2062, 2067, 2074.6). The Office of the Attorney General, as a result, has consistently advised the Commission that it should not consider economic impacts in making findings in the CESA listing context. This recommendation is also based on the fact that CESA is modeled after its federal counterpart and the federal Endangered Species Act specifically prohibits consideration of economic impacts during the listing process. The recommendation is also informed by state case law indicating that economic considerations may not be considered by the Commission when designating a species as a candidate for listing under CESA (*Natural Resources Defense Council v. California Fish and Game Comm.* (1994) 28 Cal.App.4th 1104, 1117, fn. 11).

Therefore, the Commission does not believe it is authorized to take economic impacts into account when considering listings under CESA. However, despite this belief, an analysis of potential economic impacts that may result from the proposed regulatory action on businesses and private individuals is provided below. The analysis is intended to provide disclosure, which is one of the basic premises of the APA.

The potential for significant statewide adverse economic impacts that might result from the proposed regulatory action has been assessed, and the following initial determinations relative to the following statutory categories have been made:

- (a) Significant Statewide Adverse Economic Impact Directly Affecting Business, including the Ability of California Businesses to Compete with Businesses in Other States:

The proposed regulatory action to designate coho salmon between San Francisco and Punta Gorda as endangered and between Punta Gorda and the northern border of California as threatened will afford the species the protections of CESA, which prohibit take, possession, purchase, and sale (herein collectively referred to as “take”) of

threatened and endangered species, except as authorized by the Department. To the extent businesses are engaged in activities that will take coho salmon, the proposed regulatory action may result in adverse economic impacts directly affecting businesses, including the ability of California businesses to compete with businesses in other states. However, the majority of such activities are already subject to federal take prohibitions under the federal ESA, and therefore, have incurred economic consequences as a result since the federal listings (1996 and 1997).

Where the Department authorizes take of coho salmon that is incidental to an otherwise lawful activity, impacts of the taking must be minimized and fully mitigated, and any such mitigation must be monitored for effectiveness under CESA. Permitting under CESA for incidental take of coho salmon would result in some increased costs when compared to the status quo, which includes the federal take prohibition under the federal ESA.

Potential costs of recovery of coho salmon were identified in the Response to Comments on the Draft Recovery Strategy for California Coho Salmon (*Onchorhynchus kisutch*), Report to the California Fish and Game Commission (January 2004). A currently unquantifiable fraction of these potential costs can be attributed to the listing of the species, as opposed to recovery, if practices result in take of coho salmon under CESA. (Existing practices that result in take under the federal ESA may have already incurred economic impacts.) With regard to potential impacts to timber businesses, costs of proposed policies to guide the issuance of incidental take authorizations were estimated to be \$151-373 million, or stated another way, a reduction in timberland values by an estimated 2.8 to 6.9 percent; a reduction in timberland values, which are valued at \$1,400 per acre on average, by between \$39 and \$97 per acre. However, these estimates assume that all of the recommended timberland management provisions would be applied to every timber harvesting plan. The Department does not anticipate this will be the case because the proposed policies would be recommended as necessary on a site-specific basis when take of the species would occur or if the California Department of Forestry and Fire Protection were to require them in order to mitigate significant adverse effects on the environment pursuant to the California Environmental Quality Act. Therefore, the Commission estimates that although economic impacts to timber businesses may be significant, they will likely be only a fraction of the estimates described above.

With regard to other businesses engaged in activities such as agriculture, in-stream sand and gravel extraction, construction of roads and bridges, suction dredging, and municipal and domestic water use, there may be some economic impacts if these activities would result in the take of coho salmon under CESA; however, again, a portion of these impacts may have already occurred as a result of the federal ESA listing of coho salmon.

Presently, California ocean and inland non-Indian fisheries are closed by federal and state regulators to the direct harvest of coho salmon. Therefore, there would be no adverse effect from the proposed listing on sectors associated with coho salmon fisheries.

- (b) Impact on the Creation or Elimination of Jobs within the State, the Creation of New Businesses or the Elimination of Existing Businesses, or the Expansion of Businesses in California:

Given the potential for additional economic impacts as identified above, there may be the potential for adverse impacts on new or existing jobs; however, these impacts are unlikely to cause the elimination of existing businesses in California. Whether these potential impacts actually occur depends upon the extent to which commercial activities result in take of coho salmon under CESA, the level of compliance with the federal ESA, and the costs, if any, of minimizing and mitigating for take under CESA. Therefore, these impacts are difficult to estimate at this time.

In addition, there is the potential for creation of jobs and businesses, or expansion of businesses in California. The public sector may create new jobs as a result of mitigations such as road treatment, culvert replacement, and habitat enhancement. These jobs would likely be created largely in rural counties with high levels of unemployment. Increased public education could result in increased contributions to the State's Rare and Endangered Species Tax Check-off program, which would in turn provide further funding for management and recovery activities for all listed species.

Private tour operators could also potentially benefit economically from increased tourism, interpretation, and educational activities.

Additionally, private environmental consulting firms could benefit economically from assisting in the development and implementation of mitigation measures.

- (c) Cost Impacts on a Representative Private Person or Business:

A representative private person or business may experience economic impacts as described in section (a) above.

- (d) Costs or Savings to State Agencies or Costs/Savings in Federal funding to the State:

As a project applicant, a state agency may realize costs associated with projects involving the incidental take of coho salmon as described in section (a) above.

The proposed regulatory action is not expected to affect federal funding to the state.

- (e) Nondiscretionary Costs/Savings to Local Agencies:

As a project applicant, a local agency may realize costs associated with projects involving the incidental take of coho salmon as described in section (a) above.

- (f) Programs Mandated on Local Agencies or School Districts: None.

- (g) Costs Imposed on any Local Agency or School District that is Required to be Reimbursed Under Part 7 (commencing with Section 17500) of Division 4: None.

- (h) Effect on Housing Costs: None.

Effect on Small Business

It has been determined that the adoption of these regulations may affect small business.

Consideration of Alternatives

The Commission must determine that no reasonable alternative considered by the Commission, or that has otherwise been identified and brought to the attention of the Commission, would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

FISH AND GAME COMMISSION

Dated: February 26, 2004

Robert R. Treanor
Executive Director